82-1225

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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HARTLEY E. GREENLEAF, JR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a failure by the defendant to renew a motion for a judgment of acquittal at the close of the case when a minimal defense is presented waives the opportunity for a review of the sufficiency of the evidence on appeal?

2. Whether a mailing which occurs a significant time after the completion of a scheme to defraud and neither advances nor conceals the scheme is sufficiently related to the execution of the fraud to support a conviction for mail fraud.

3. Whether the imposition of consecutive sentences for violations of the Racketeering Corrupt Organizations Act (18 U.S.C. sec. 1962(c)) and the predicate offenses of mail fraud is

violative of the defendant's Fifth Amendment protection against double jeopardy.

4. Whether it is reversable error for the trial judge to instruct the jury that a person intends the natural and probable consequences of his actions when conviction beyond a reasonable doubt was based upon a finding of specific intent.

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B. OPINIONS BELOW

The petitioner (f/n 1.) was convicted before the Honorable Andrew J. Caffrey in the United States District Court for the District of Massachusetts on March 8, 1982.

The judgment was affirmed (f/n 2.) by the United States Court of Appeals for the First Circuit on November 2, 1982. Mandate issued on November 23, 1982 upon denial of a Motion For Stay Pending Review In This Court.

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f/n 1 - William Bratton was charged and convicted of mail fraud and racketeering along with the petitioner.

f/n 2 - The judgment against co-defendant Bratton was also affirmed.

C. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

D. CONSTITUTIONAL, STATUTORY & RULES PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Consitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. sec. 2 (reproduced in Appendix)

3. 18 U.S.C. sec. 1341 (reproduced in Appendix)

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7. Fed. R. Crim. P. 29 (reproduced in Appendix)

## E. STATEMENT OF THE CASE

The petitioner, Hartley E. Greenleaf, Jr., was convicted of aiding and abetting

Joseph "Gus" Manning in a scheme to defraud the producers of two motion pictures filmed in Boston in 1977 and 1978 (f/n 3) and Local 25 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. The alleged scheme consisted of placing names of people who did not work on the production company payrolls to generate payroll checks and union pension contributions. Mr. Manning was a trustee of Local 25 and the man responsible for negotiating Teamster contracts with all motion picture companies filming in New England.

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f/n 3 - The indictment also charged Joseph Manning, Ernest Sheehan and William Bratton in connection with the fraudulent scheme. Manning was severed after three days of trial because of chest pains and resultant hospitalization. Sheehan was severed for health reasons prior to the jury's being sworn. Bratton was tried and convicted jointly with the petitioner.

The petitioner was selected by Manning to be the Teamster driver captain on the productions of the motion pictures International Velvet and Oliver's Story. In this capacity he supervised the drivers on the set and on a weekly basis distributed time cards, collected and approved them, submitted them to the movie company supervisors and then dispensed the resulting paychecks. He also saw to it that W-4 forms were filled out for each driver (f/n 4.).

International Velvet was produced in Boston in September 1977 by Metro-Goldwyn Mayer (MGM). Prior to the commencement of production, Gus Manning

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f/n 4 - Co-defendant Bratton served the same function on the production of the motion picture The Brinks Job. The defendants were not alleged to have any connection with each other in carrying out the schemes.

met with the unit production manager, Peter Runfolo, and negotiated the terms for supplying Teamster drivers for vehicles used by the company. Runfolo did not agree to provide for drivers who would not show up for work. Drivers were subsequently assigned to the job and Greenleaf appointed Teamster Captain.

In 1978, Paramount Pictures filmed Oliver's Story in Boston. A similar sequence of events preceeded the production company's arrival in town. Manning met with the production manager, Richard McWhorten, and negotiated the deal for drivers without any agreement about workers who would not show. Manning then assigned drivers and appointed Greenleaf Teamster Captain.

The government alleged that fraud was perpetrated by submitting time cards

and W-4 forms for three men who never appeared on the movie sets. On International Velvet payroll checks were issued for Francis Manning and Benjamin DeFlumere. Manning was found to be a fictitious person and DeFlumere is Gus Manning's son-in-law who was with him in Hawaii at the time. On Oliver's Story checks issued to Henry Gatto for work he did not do.

These payroll checks were issued by the location auditors and accountants on the particular production. In preparing the payroll they relied on the time cards received directly from Greenleaf or a production supervisor after Greenleaf collected them from the drivers who had filled them out, sometimes with Greenleaf's assistance. The mail was not used in this transaction. Once prepared, the checks passed in reverse

through the same channels, again without the use of the mail (f/n 5).

The mail fraud charges were based upon the mailing of W-2 forms and pension remittance reports and checks a significant time after the receipt of the object of the fraud - the paychecks. (f/n 6). In the case of the film

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f/n 5 - At trial the government presented evidence that Greenleaf filled out the time cards and W-4 form for Benjamin DeFlumere and time sheets for Henry Gatto. Gus Manning filled out the Gatto W-4. Furthermore, the paycheck for the fictitious Francis Manning had been endorsed by Gus Manning and evidence indicated that he may also have been the endorser on the Gatto and DeFlumere checks. It was clear that the petitioner was not the recipient of any of the funds. In fact, both Gatto and DeFlumere received payment from Manning for their "no show" status.

f/n 6 - The film companies were obligated to make contributions to the Teamster Pension Fund and Health and Welfare Fund. The amount of the contribution was determined by multiplying the contracted rate by the hours each person purportedly worked.

International Velvet, the W-2 forms were mailed after the first of the next year by the patroll company hired by MGM to handle the film company clerical and accounting procedures. The information on the W-4 forms was, of course, used to prepare the W-2s. They also dealt in the normal course of their business with the pension and health and welfare contributions for their many employees, mailing them to the appropriate party. In this case, the contributions went to Add-Men Services Inc. and the Teamster Pension Fund who administered the Teamster benefit programs. A similar procedure was followed by Paramount and their in-house accounting department on the Oliver's Story production.

F. REASONS FOR GRANTING THE WRIT

I. THE DEFENDANTS FAILURE TO RENEW A MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE DID NOT WAIVE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

The petitioner argued the sufficiency of the evidence on appeal to the United States Court of Appeals for the First Circuit. The government contended that petitioner Greenleaf was precluded from arguing the sufficiency of the evidence on appeal due to a failure to move for a judgment of acquittal at the close of all the evidence. The government suggested that a defendant must renew a motion for judgment of acquittal denied at the close of the government's case if a defense is presented or waive an opportunity for review of the sufficiency of the evidence on appeal.

The petitioner moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 at the close of the government's case. The trial judge denied the motion. In effect, this functioned as a reservation pending an opportunity for the defense to fill in factual gaps in the evidence. 8A Moore's Federal Practice sec. 29.03[1]. The defendant then offered one witness and rested. All parties then rested their cases (f/n 7). The trial judge allowed the initial denial to stand f/n 8).

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f/n 7 - All of these actions took place on the seventh day of trial.

f/n 8 - It is important to realize the discretion given the trial judge to rule on the matter of the sufficiency of the evidence at the close of the evidence with or without a motion by the defendant. Advocates of the waiver doctrine pose that its value lies in the desirability of affording the trial judge the opportunity to rule in the first instance. The First Circuit erroneously stated that the defendant's failure to so move in fact denied the judge this opportunity (App. p. 3(a)6.) Quite simply, this is incorrect.

The First Circuit adopted the government's position. The Court relied on its ruling in United States v. Kilcullen, 546 F2d 435 (1 Cir. 1976). The Court went on to consider the evidence in support of the defendant's conviction applying the stricter standard of "clear & gross injustice." As a result, the Court held that though "the connection between the alleged schemes and the mailings poses a close question (emphasis added), we are unable to find that convictions based on these mailings are clearly and grossly unjust." (App. 3(a)7). Such a ruling in light of the Court's inability to ennunciate the legal principal central to the determination is clearly erroneous. (see Reasons for Granting the Writ Part II).

A. The Defendant's Motion For Judgment Of Acquittal At The Close Of The Government's Case Adequately Preserved The Right To Appeal The Sufficiency Of The Evidence Where The Defense Presented Only Minimal Evidence Of No Benefit To The Government

Had the defendant rested without presenting evidence the waiver doctrine would not have operated to erase the right to appeal. Since he did he was punished. If a defendant chooses to present a defense and presents nothing of use to the government, the reasonable approach is to disregard the necessity of a renewal of the motion. Cephus v. U.S., 324 F.2d 893,895 (D.C. Cir. 1963). Such a practice makes particular sense in a situation where a defendant makes a minimal presentation and rests within a matter of hours of the initial denial. Cephus v. U.S., supra. No one need be reminded of his belief that the

evidence presented against him is insufficient to establish guilt.

The spirit and intent of the procedural rules are not compromised by disregarding a harmless failure to renew the motion where an initial motion has been made. The appellate court is not considering an issue not raised before the trial judge. In fact, justice is enhanced by encouraging both sides to present their positions without fear of suffering irreparable prejudice.

B. There Is A Conflict Among The Circuits As To The Operation Of Fed. R. Crim. P. 29 and The Status of The Waiver Doctrine. This Court Should Resolve This Conflict

The traditional rule has been that a defendant's failure to move for a judgment of acquittal at the close of

all the evidence precludes him from raising it on appeal. U.S. v. Oliver, 570 F2d 397,403 (1 Cir. 1978)' U. S. v. Phipp, 543 F2d 576,577 (5 Cir. 1976); U.S. v. Newsome, 444 F2d 109,110 (6 Cir. 1971); U.S. v. Martinez,514 F2d 334,337 (9 Cir. 1975). However, there has been considerable erosion of the rule. It is now equally recognized in the majority of circuits that where a manifest miscarriage of justice has occurred, the appellate court may review the sufficiency of the evidence despite a failure to renew the motion for judgment of acquittal at the close of all the evidence. U.S. v. Kilcullen at 441; U.S. v. Stamas, 443 F2d 860 (1 Cir. 1971) cert. den. 404 U.S. 851, 30 LEd 2d 90,92 S.Ct. 86; U.S. v. Kaplan, 586 F2d 980 (2 Cir. 1978); U.S. v. Renee Ice Cream Co., 160 F2d 353 (3 Cir. 1947); U.S. v. Owens, 453 F2d 355 (5

Cir. 1971); U.S. v. Landers, 484 F2d 93 (5 Cir. 1973), cert. den., 415 U.S. 924, 39 LEd 2d 480, 94 S.Ct. 1428; Carr v. U.S., 278 F2d 702 (6 Cir. 1960); U.S. v. Curtis, 568 F2d 643 (9 Cir. 1978).

The Seventh Circuit appears to have abandoned the waiver rule altogether. U.S. v. Rizzo, 416 F2d 734,736 n.3 (7 Cir. 1969). The Eighth Circuit gives the rule only partial effect by reviewing the sufficiency of the evidence despite a failure to renew, considering the evidence of both the government and the defendant. U.S. v. Sanders, 547 F2d 1037, 1040 n.5 (8 Cir. 1976); United States v. McIntyre, 467 F2d 274,276 n.1 (8 Cir. 1972), cert. denied, 410 U.S. 910 (1973). The D.C. Circuit overlooks the omission entirely in certain circumstances, Cephus v. U.S., supra.

The First Circuit is similarly disposed to on one hand assert the rule yet on the other hand ignore it. The sufficiency of the evidence has been consistently reviewed to determine whether a miscarriage of justice has occurred and a defendant wrongly convicted. U.S. v. Kilcullen, at 441; U.S. v. Sanborn, 563 F2d 488, 490 (1 Cir. 1977); U.S. v. Bynum, 567 F2d 1167,1171 (1 Cir. 1978); U.S. v. Oliver at 403 (1 Cir. 1978). Yet, the result, like that in the present case, often turns on a procedural "but for". If one is not to be deprived of liberty without due process, it seems manifestly unjust to so deprive for failure to follow a rule which is given little respect by those charged with its enforcement.

## II. THE MAILINGS WERE NOT SUFFICIENTLY RELATED TO THE SCHEME TO DEFRAUD AS REQUIRED FOR A MAIL FRAUD CONVICTION UNDER 18 U.S.C. SEC. 1341.

Upon review, the First Circuit found that the mailings in furtherance of the alleged scheme to defraud "occurred a significant time after the receipt of the object of the scheme." (App.3(a)8). They furthermore stated that "the law is in some confusion regarding when mailings will be found to have been in furtherance of a fraudulent scheme." (App. 3(a)9). Nevertheless, the judgment of the trial court was affirmed finding "no such egregious misapplication of legal principles as to constitute clear & gross injustice." (App. p. 3(a)13). The petitioner is at a loss as to how the court can find no egregious misapplication of legal principle when it admittedly cannot state the legal principle which

governs. Justice requires more than a coin toss.

The government argued at trial and on appeal that any time one sets in motion a scheme to defraud which inevitably results in a mailing, he can be guilty of mail fraud. The petitioner disagreed with this notion asserting that the law requires that the mailings be sufficiently related to the scheme so as to be necessary to its success. The W-2 forms and pension checks at issue were mailed some time after the receipt of the fruit of the scheme and had little if any effect upon the success or failure of the scheme.

The government's argument was based on the requirement that:
(1) to be sufficiently closely related to a fraudulent scheme, "it is not

necessary to contemplate the use of the mails as an essential element." Pereira v. United States, 347 U.S. 1,8 (1954) and (2) the success of the scheme must depend on mailings "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and, therefore, make the apprehension of the defendant less likely than if no mailings had taken place." United States v. Maze, 414 U.S. 395, 403 (1973); Parr v. United States, 363 U.S. 370 (1960). In fact, the evidence did not support a finding that the mailings had this effect.

The First Circuit began its review with the two basic requirements this Court stated in the Pereira and Maze decisions. (App. 3(a)9). The Court then noted the disparate and conflicting interpretations these precepts have

produced when courts face the question of when a mailing will be found to be in furtherance of a fraudulent scheme.

The Seventh Circuit gives a broad sweep to the statute finding conviction appropriate if a mailing is a "normal concomitant(s) of a transaction that is essential to the fraudulant scheme." (App.3(a)10 quoting United States v. Galloway, 664 F2d 161,163 (7 Cir. 1981). The Third, Fourth & D.C. Circuits are more restrictive, requiring evidence that the mailing furthered the scheme or concealed the fraud. (App. 3(a)11).

The government theory in support of Mr. Greenleaf's conviction was overly broad. The First Circuit apparently refused to accept it, finding incompatibility with Maze (App. 3(a)11). The Court stated that ". . . under this

[the government's] test, the conviction in United States v. Maze, supra, would have been affirmed." (App. 3(a)12). Yet, in direct contravention of this statement the Greenleaf conviction was upheld.

The law of mail fraud was in disarray prior to the ruling. It is in worse stead in its aftermath. The inability of the Court to do no more than delineate the conflicting positions of those courts which have thus far faced the problem is indicative of the need for further guidance from this Honorable Court. It furthermore indicates that the petitioner was in fact found guilty by a clear and grossly unjust misapplication of legal principle.

## III. THE IMPOSITION OF CONSECUTIVE SENTENCES FOR VIOLATIONS OF THE RACKETEERING CORRUPT ORGANIZATIONS ACT (18 U.S.C. SEC. 1962(C)) AND THE PREDICATE OFFENSES OF MAIL FRAUD, (18 U.S.C. SEC. 1341) IS VIOLATIVE OF THE DEFENDANT'S FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY.

The defendant was sentenced to two years imprisonment for the substantive RICO violation and was given suspended two year sentences for the predicate mail fraud offenses to be served concurrently upon completion of the sentence imposed for racketeering. Two years probation was given in lieu of the two year mail fraud sentences and a fine of $2,500 was ordered. (App. p. 1(a)).

The Fifth Amendment guarantee against double jeopardy protects one from multiple punishments for the same offense. Ex parte Lange, 18 Wall. 163, 168, 21 L.Ed. 872; Whalen v. U.S., 445 U.S. 684, 100

S.Ct. 1432,1436, 64 L.Ed.2d. 715 (1980); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072,2076, 23 L.Ed.2d. 656 (1969); U.S. Constitution, Amendment 5. At the very least, this precludes federal courts from imposing multiple sentences unless Congress has so authorized. Whalen at 1436. It is, of course, constitutionally the domain of the legislature to define criminal offenses and prescribe punishment. See U.S. v. Wiltberger, 5 Wheat. 76,95, 5 L.Ed. 37. This Court, in Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180,182, 76 L.Ed. 306 (1932), adopted what had long been judicial practice in statutory interpretation under the Double Jeopardy Clause, based upon the assumption that Congress does not intend to punish the same offense under different statutes. Whalen at 1438. The "Blockburger test" used in the absence of a clear

statutory mandate, requires that multiple punishments are suitable only where proof of each offense "requires proof of an additional fact which the other does not." Blockburger at 304.

This standard is crucial where one criminal act must be proven as precursor to proof of another. Lesser and greater included offenses may be alleged separately. Gaunt v. U.S., 184 F2d 284,290 (1st Cir. 1950) cert. denied 340 U.S. 917 (1951). The same offense may also be alleged in separate counts. U.S. v. Honneus, 508 F2d 566,570 (1st Cir. 1974) cert. denied, 421 U.S. 948 (1975). Such pleading cannot result in multiple punishment, however, because the strictures of Blockburger cannot be satisfied. Consequently, Congress may treat varying aspects of the same conduct as separate offenses only where

there is a meaningful distinction between them. Honneus at 569.

The substantive RICO violation at issue in this case required a finding that the defendant was associated with an enterprise involved in interstate commerce and conducted the activities of that enterprise through a pattern of racketeering activity. 18 U.S.C. sec. 1962(c). A "pattern of racketeering activity" requires the commission of two or more enumerated acts which include violation of the mail fraud provisions of 18 U.S.C. sec. 1341. 18 U.S.C. sec. 1961 (5) and (1)(B). Thus, to find the defendant guilty of the RICO violation it was necessary to first find him guilty of at least two counts of mail fraud as alleged in the indictment. Applying the "Blockburger test", the elements of mail fraud plus the additional facts of

"enterprise" (membership in Teamster Local 25) and "conducting the activities through" (acts committed while performing Teamster duties) were required for a RICO conviction pursuant to 18 U.S.C. sec. 1962(c). Once the predicate mail fraud offenses were elected by the government in framing the RICO indictment, they became lesser included offenses of the RICO offense.

Those cases which have thus far faced the double jeopardy dangers of RICO have found it permissable to charge a defendant with both RICO and the predicate offenses. U.S. v. Frumento, 563 F2d 1083, 1089 (3rd Cir. 1977); U.S. v. Grande, 620 F2d. 1026,1030 (4th Cir. 1980); U.S. v. Stofsky, 409 F.Supp. 609, 617-18 (SDNY 1973) aff'd 527 F2d 237 (2nd Cir. 1975) cert. denied 429 U.S. 819 (1976). But it has been noted that:

> The issue of multiple punishment for the same criminal act will not ripen unless and until guilty verdicts are returned on the allegedly overlapping counts, or unless and until it becomes obvious at trial that the evidence with respect to the contested counts is, in fact, the same.
>
> Stofsky, at 618

The Second and Ninth Circuits have since faced the question and ruled in favor of consecutive sentencing. U.S. v. Rone, 598 F2d 564 (9th Cir. 1979); U.S. v. Boylan, 620 F2d 359 (2nd Cir. 1980); U.S. v. Scotto, 641 F2d 47 (2nd Cir. 1980). The defendant in Rone, the leading case, was convicted of murder and extortion as predicates to the substantive RICO violation. Consecutive sentences were imposed. Yet, as Barry Tarlow has pointed out in his commentary RICO, The New Darling Of The Prosecutor's Nursery:

> Rone, however, should not be regarded as persuasive authority because it failed to recognize that

> the significant issue is not whether the offenses are identical so that they cannotr be prosecuted separately, but whether the predicate offenses are lesser included offenses within a RICO offense.
> 49 Fordham L. Rev. 165,263

The Rone court itself hinted at the error of its ways. "If the RICO sec. 1962(c) charge was based solely on the two extortions, there might be problems under Blockburger. Rone at 576. Obviously, the decision in Rone was based on the fact that the government had charged two different predicate offenses one of which was murder. In this case, the predicate offenses are both mail fraud and the reasoning in Rone is not applicable.

The legislative purposes of 18 U.S.C. secs. 1341 and 1962(c) are functionally the same. Mail fraud proscribes use of the mails for fraudulent

purposes. RICO is triggered when that use is multiplied and becomes a corrupting influence upon an enterprise.

The RICO offenses were formulated to hamstring the efforts of individuals who would conduct the affairs of an enterprise in a "racketeering" manner. The Ninth Circuit is correct in pointing out that RICO was to provide for "new penal provisions and enhanced sanctions." Rone at 572; see also Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted. The statute satisfies that purpose. Punishment provided is harsh and includes unique forfeiture provisions. 18 U.S.C. sec. 1963. The effect is to enhance the sanctions already existing for predicate offenses by creating what is essentially a penalty for aggravated behavior.

Thus, with no clear legislative statement to the contrary, separate punishment is highly improper when, as here, the predicate offenses charged are in substance lesser included. It cannot withstand the test of Blockburger. What cannot be allowed is to punish a defendant with the increased RICO sanctions and then punish the defendant again for the same offenses under the predicate statute. The trial court violated not only the specific guarantee against double jeopardy in doing so but also the principle of separation of powers be exceeding its authority in the imposition of multiple consecutive sentences. Whalen at 1436-37.

IV. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY THAT A PERSON INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTIONS WHERE CONVICTION BEYOND A REASONABLE DOUBT WAS BASED UPON A FINDING OF SPECIFIC INTENT.

The petitioner was convicted of knowingly and willfully aiding and abetting four mail fraud violations as precursors to a conviction for aiding and abetting a substantive violation of the Racketeering Influenced Corrupt Organization Act. 18 U.S.C. sec. 1341, 1961(c).

Intent is an essential element in determining whether a defendant is guilty beyond a reasonable doubt of aidig and abetting the commission of a crime. Nye & Nissen v. U.S., 336 U.S. 613, 619, 69 S.Ct. 766,770, 93 L.Ed 919 (1949). A proper, comprehensive instruction to the jury on the issue of intent is

mandated where it is of such material importance. U.S. v. Winter, 663 F2d. 1120,1145 (1st Cir. 1981).

The trial judge instructed the jury that "It is reasonable, however, for you to infer that a person ordinarily intends the natural and probable consequences of any act you find he knowingly did." (f/n 10). This is substantially that instruction which this Court declared unconstitutional in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The First Circuit condemned a nearly identical instruction in U.S. v. Winter, 663 F2d 1120,1143-44 (1st Cir. 1981). See also U.S. v. Ariza-Ibarra, 605 F2d 1216 (1 Cir.

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f/n 10 - Defense counsel made a timely objection to the instruction.

1976). The Court held that "it is always error to instruct the jury that a person is presumed to intend the natural and probable or ordinary consequences of his acts. . .this sort of instruction should not be used." Winter at 1144. A juror could reasonable view the instruction as a mandatory presumption, either irrebutable or operating to shift the burden of proof on the matter of intent to the defendant. Winter at 1144.

Two aspects of the mail fraud conviction are affected by this presumption. Mail fraud requires a finding of specific intent to defraud. U.S. v. Proctor & Gamble Co., 47 F.Supp. 676 (D.C. Mass. 1942); U.S. v. Keane, 552 F2d 534,544 (7th Cir. 1975) cert. denied, 424 U.S. 976, 96 S.Ct. 1481, 42 L.Ed.2d 746 (1976). This is crucial, otherwise innocent activity results in

criminal conviction. Badders v. U.S., 240 U.S. 391,394, 36 S.Ct. 367, 60 L.Ed.706 (1916). The presumptive instruction allows specific intent to be inferred from any act resulting in fraud.

Mail fraud also requires a finding that the defendant contemplated the use of the mails in furtherance of the fraudulent scheme. Proctor & Gamble at 679. The jury was instructed to ask whether Greenleaf "knowingly or willfully placed or caused to be placed in an authorized depository for the mail. . ." the items in question. Here, the presumptive instruction results in an equally distressing conclusion. Use of the mails in furtherance of a scheme to defraud is presumed to have been contemplated.

In the Winter case, the First Circuit sternly criticized the instruction given yet found that it did not contribute to the defendants' mail fraud and RICO convictions. U.S. v. Winter at 1145. The defendants had not claimed that they did not intend the natural consequences of their actions; they denied the actions altogether and thus the instruction was not material to conviction.

Petitioner Greenleaf did not deny his actions. He asserted that he had no criminal intent whatsoever in doing them. Yet, the First Circuit, despite the obvious distinction from Winter, ruled just as before - sternly criticising the use of the presumptive instruction yet finding it harmless (App. 3(a)17-19).

An instruction is not harmless error when for there exists a "reasonable

possibility that the evidence (error) complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18,23, 87 S.Ct. 824,827, 17 L.Ed.2d. 705 (1967) quoting Fahey v. Connecticut, 375 U.S. 85,86-87, 84 S.Ct. 229,230-231, 11 L.Ed.2d 171 (1963). The First Circuit has sanctioned a blatant departure from the practice this Court has mandated for the conduct of a responsible judiciary. If the lesson of Sandstrom v. Montana is to be an effective tool for simplifying and elucidating the language of the law for the jury, it must be enforced.

## G. CONCLUSION

For these reasons the Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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JUDGMENT AND COMMITMENT

OF

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Finding and Judgment

"There being a verdict of Guilty Defendant has been convicted as charged of the offense(s) of being a person associated with an enterprise which affected interstate commerce and knowingly and wilfully conducting and participating in the affairs of said enterprises through a pattern of racketeering activity; in violation of 18USC, Section 1962(c) and 2, (Count 26); and with devising a scheme and artifice to defraud and for the purpose of executing such scheme knowingly

and wilfully causing the placing of mail matters in an authorized depository for mail matter; in violation of 18 USC, Section 1341 and 2, (Counts 12,13,16, & 18).

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years on Count 26. On Counts 12,13,16 & 18 - imprisonment for a period of two years, execution of these sentences is suspended and the defendant is placed on probation on these counts

for a period of two years. These sentences on Counts 12,13, 16, & 18 are to be served concurrently with each other and to commence upon completion of sentence imposed on Count 26. The Court further orders the defendant to pay a fine in the amount of $2,500."

Andrew A. Caffrey
U.S. District Judge

March 8, 1982

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 82-1264

UNITED STATES OF AMERICA,
Appellee,

V.

HARTLEY E. GREELEAF, JR.,
Defendant, Appellant

JUDGMENT

Entered: November 2, 1982

This cause came on to be heard from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

_____ Clerk.

3(a) 1-27

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 82-1264

UNITED STATES OF AMERICA,
Appellee,
v.

HARTLEY E. GREENLEAF, JR.,
Defendant, Appellant.

No. 82-1265

UNITED STATES OF AMERICA,
Appellee,

v.
WILLIAM BRATTON,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS
Hon. Andrew A. Caffrey,
U.S. District Judge

Before
Coffin, Chief Judge,
Campbell and Bownes, Circuit Judges.

Michael Reilly, with whom Thomas C. Troy, and Troy, Tommasino, Anderson & Reilly, P.C. were on brief for appellant Hartley E. Greenleaf, Jr.

Michael H. Riley, with whom John P. White, Jr., and White, Inker, Aronson, Connelly & Norton, P.C. were on brief, for appellant William Bratton.

John M. Bowens, Special Attorney, with whom William F. Weld, United States Attorney, Jeremiah T. O'Sullivan, Special Attorney, and Robert M. Waller, Special Attorney, Department of Justice, were on brief for appellee.

November 2, 1982

COFFIN, Chief Judge. William Bratton and Hartley E. Greenleaf, Jr., appeal from their convictions for twelve separate counts of mail fraud, in violation of 18 U.S.C., secs. 1341 and 2, and one count of conducting the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. sec. 1962. They were tried by a jury in the United States District Court for the District of Massachusetts.

The defendants were charged with participating with Joseph "Gus" Manning in schemes to defraud the producers of three motion pictures, The Brink's Job, Oliver's Story and International Velvet, by placing on the production company payrolls the names of people who did not work. They were also charged with aiding and abetting Manning, who was a trustee and organizer for Local

25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Local 25), in schemes to defraud the Union. The defendants were not alledged to have had any connection with each other in carrying out the schemes. They were appointed by Manning to serve as Teamster Captains on different movies. As Captains, they were responsible for filling out "start slips" for each Teamster employee. The start slips consisted of payroll information on one side and an Internal Revenue Service W-4 form on the other. The Captains were also responsible for submitting time cards for the employees and for distributing to them their salary checks.

The government charged that the defendants perpetrated the frauds by forging the start slips and submitting

time cards in the names of three men who did not work on the movies: Henry Gatto, William O'Leary and Benjamin DeFlumere. Defendant Greenleaf also filled out a slip and submitted time cards in the name of a fictitious person, Francis Manning. The address listed on the tax and payroll information was that of Gus Manning and it was he who endorsed and cashed the salary checks. The mailings on which the government based the mail fraud charges were W-2 forms sent by the producers at the end of the year to the "no-show" employees at Manning's address and contributions and remittance reports which the producers were required to send to two Teamster pension funds in the names of "no show" employees.

The indictment alleged a scheme to defraud participated in by Manning, Bratton and Greenleaf (f/n 1). Manning's

case was severed after the third day of trial when he complained of chest pains and was admitted to the hospital. The defendants moved for a mistrial because of the severance and the motion was denied. The jury found Greenleaf guilty on all counts and Bratton on all but one (f/n 2). On appeal, they challenged almost every aspect of the proceeding below.

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1. The indictment also charged Ernest Sheehan with extorting money in furtherance of the fraudulent scheme. His case was severed and continued for health reasons prior to the jury's being sworn.

2. Bratton was found not guilty of Count II, which charged mail fraud in connection with the motion picture, The Brinks Job, and resulted in the mailing of a W-2 in the name of Henry Gatto.

## Adequacy of the Mailings

1. Failure to Object

Appellants challenge the sufficiency of the evidence produced by the government that the mailings charged in the indictment were "for the purpose of executing [the alleged] scheme or artifice" to defraud. The first issue before us is whether the defendants' failure to make that objection at the close of all of the evidence at trial precludes their raising the issue on appeal.

The defendants moved for acquittal at the close of the government's case and the motion was denied. After introducing their own witness, however, they failed to renew their motion. The rule in this circuit is that a defendant who presents evidence and fails to revew a motion for acquittal is deemed to have

waived his original motion. United States v. Kilcullen, 546 F.2d 435 (1st Cir. 1976). In order to prevail on appeal on that ground, the defendants must then demonstrate "clear and gross" injustice. Id. at 441. The rule is based on the sound principle that evidentiary challenges should be put in the first instance to the trial judge, who is in the best position to rule on such matters. Id.

We see no reason to depart from the Kilcullen rule in this case. By failing to renew their objection to the sufficiency of the evidence at the close of their own case, the defendants denied the trial judge the opportunity to rule on the motion before sending the case to the jury. To prevail on appeal, therefore, they must demonstrate that their convictions are clearly and grossly

unjust. While we find that the connection between the alleged schemes and the mailings poses a close question, we are unable to find that convictions based on those mailings are clearly and grossly unjust.

2. Nexus Between The Mailings And The Fraudulent Scheme

To determine whether there was clear and gross injustice in convicting the defendants of mail fraud on the evidence produced by the government, we examine both the facts surrounding the mailings alleged to have been in furtherance of the schemes and the applicable legal principles. The mailings in this case consisted of W-2 forms mailed to the "no show" workers at Manning's address by the defrauded producers and of checks and remittance reports mailed by the

producers to two employee pension funds on behalf of the "no show" workers. International Velvet was filmed in September and October of 1977. During that time, start slips and time cards were submitted for the "no show" employees and salary checks received in their names. W-2s for those employees were mailed in January of 1978 and pension fund contributions made in their names in April of 1978. Oliver's Story was filmed early in 1978. The Brink's Job was filmed in May and June of 1978. In both cases, the time lag between the receipt of salary checks for the "no show" employees and the mailing of W-2s and pension fund contributions in their names was similar to that in the International Velvet filming. Thus, in each case, the mailings occurred a significant time after the receipt of the object of the scheme -- the fraudulently induced salary

checks. The question remaining is whether, despite the time lag, those mailings can be said to have been in furtherance of the fraudulent scheme.

The last is in some confusion regarding when mailings will be found to have been in furtherance of a fraudulent scheme. On one hand, the Supreme Court has made clear that for mailings to be sufficiently closely related to a fraudulent scheme to support mail fraud convictions, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." Pereira v. United States, 347 U.S. 1,8 (1954). All that is required is that the mailings be "incident to an essential part of the scheme." Id. On the other hand, the Court has indicated that the success of the scheme must be dependent in some way on the mailings,

either in obtaining the desired object or in avoiding or delaying detection of the scheme. United States v. Maze, 414 U.S. 395, 402-03 (1973); Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944). See also United States v. Blecker, 657 F.2d 629,636 (4th Cir., 1981); United States v. Galloway, 664 F.2d 161,163, n.3 (7th Cir. 1981); United States v. Kent, 608 F.2d 542,546 (5th Cir. 1979).

Some courts have read the Supreme Court's requirements broadly, accepting as a basis for mail fraud convictions any mailings that can be said to be "normal concomitant[s] of a transaction that is essential to the fraudulent scheme." See, e.g., United States v. Galloway, supra, 664 F.2d at 163; United States v. Lea, 618 F.2d 426,430

(7th Cir.). See also Ohrynowicz v. United States, 542 F.2d 715 (7th Cir. 1976). Other courts have been more restrictive, rejecting malings that "neither furthered the objective of the scheme. . . nor served to conceal the fraudulent representations." See United States v. Alston, 609 F.2d 531, 539 (D.C. Cir. 1979). See also United States v. Kennan, 657 F.2d 41, 43 (4th Cir. 1981); United States v. Brown, 583 F.2d 659 (3d Cir. 1978); United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977).

The government urges us to adopt a rule that any time a defendant sets in motion a scheme that leads ineluctably to mailings, he can be guilty of mail fraud. Our reluctance to do so stems from the fact that under this test, the conviction in United States v. Maze,

supra, would have been affirmed. The mailings in Maze, sales slips of purchases made by the defendant, flowed automatically from his fraudulent use of a stolen credit card. Nevertheless, the Supreme Court held that the mails were not used for the purpose of executing the fraudulent scheme. 414 U.S. at 405.

There are, on the other hand, significant differences between this case and Maze. The schemes in this case were much broader and more sophisticated than that of Maze. The schemes required for their continuing success the creation of an appearance of business as usual and the mailings at issue here were an integral part of that apperaance. In addition, the defendants apparently contemplated the generation of those mailings, since they used Manning's address on the forged W-4 forms in order,

one might conclude, to prevent W-2s from being sent to persons who would reveal the scheme.

We need not decide how we would rule on these mailings had the issue been properly raised below. Suffice it to say that we see no such egregious misapplication of legal principles as to constitute clear and gross injustice.(f/n 3).

## Severance

Besides challenging the sufficiency of the government's evidence, the appellants complain of a number of other errors in the proceeding below. They

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3. Defendant Greenleaf also challenges the sufficiency of the evidence that he had the requisite intent to be guilty of aiding and abetting. We are satisfied that, having heard the evidence that Greenleaf forged names on the W-4 forms and lied to a federal agent and to the grand jury, a reasonable juror could find the requisite intent. The conviction was far from clear and gross injustice.

argue, first, that they were prejudiced by being tried together. On appeal, both defendants urge that joinder was improper under Fed. R. Crim. P. 8(b) because there was no evidence that they had participated in the same act or transactions. The only link between their two alleged schemes was Count 26, a substantive RICO count. Neither defendant, however, raised this issue in the district court. (f/n 4). Thus, our review is limited to

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4. Defendant Greenleaf moved before trial for severance on the grounds that the government intended to introduce "as against him statements made by other persons in the nature of admissions or confessions which are not admissible against this defendant and which will prejudice this defendant's right to a fair trial." He did not suggest that joinder was improper under Rule 8(b). Defendant Bratton moved for severance on the fifth day of the trial. He did not specify his grounds. On appeal, he treats that motion as one for misjoinder under Rule 8(b). At that point in the trial, however, his motion, whether construed as an 8(b) challenge to initial joinder or a Rule 14 motion for severance, was too late. See Rule 12(b). We therefore look only for plain error in the denial of defendant Bratton's motion and find that there was none.

whether there was plain error. United States v. Barbosa, 666 F.2d 704 (1st Cir. 1981). We cannot say that joinder of two defendants alleged to have perpetrated, with a common third party, almost identical schemes to defraud a common enterprise was plain error.

Even though initial joinder may be proper, a defendant may be entitled to severance pursuant to Fed. R. Crim P. 14 if he can show that he would suffer substantial prejudice from a joint trial. (f/n 5). United States v. Tashjian, 660 F.2d 829, 834 (1st Cir. 1981); United States v. Patterson, 664 F.2d 890, 900 (1st Cir. 1981). Whether a severance should be granted is a question for the trial judge's discretion. United States

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5. As noted in footnote 4, only defendant defendant Greenleaf made a timely motion pursuant to Rule 14.

v. Tashjian, 660 F.2d at 834. He should be reversed only if defendants can show that this refusal to sever deprived them of a fair trial and resulted in a possible miscarriage of justice. United States v. Barbosa, supra, 666 F.2d at 708; United States v. Davis, 623 F.2d 188, 194-5 (1st Cir. 1980).

We are not persuaded that the district court abused its discretion in denying the defendants' motions to sever. The indictment made clear that the defendants were charged in connection with separate motion pictures. Most of the evidence presented related to a particular motion picture. Thus, it is unlikely that the jury confused the evidence against the individual defendants. The trial court emphasized to the jury that the defendants were charged in different counts and that they

were to consider separately the evidence as to each count. The fact that defendant Bratton was acquitted on Count II reassures us that the jury complied with the court's directives. United States v. Tashjian, supra, 660 F.2d at 834. In sum, it appears that the defendants suffered no more prejudice "than that which necesssarily inheres whenever multiple defendants or multiple charges are jointly tried." Id.; United States v. Adams, 581 F.2d 193,198 (9th Cir. 1978).

The Court's Charge To The Jury

Appellant Greenleaf challenges the district court's instruction to the jury. To convict the defendants of mail fraud the government was required to prove that they knowingly and willfully devised the alleged fraudulent scheme. The court charged the jury that [i]t is reasonable

. . . for you to infer that a person ordinarily intends the natural and probable consequences of any act that you find he knowingly did."

We have repeatedly warned against this and similar language that suggests a mandatory inference of intent and thus relieves the government of its burden of proof on the issue of intent. See United States v. Ariza-Ibarra, 605 F.2d 1216 (1st Cir. 1979) (virtually identical instruction); See also United States v. Winter, 663 F.2d 1120 (1st Cir. 1981). In Sandstrom v. Montana, 442 U.S. 510 (1979), the Supreme Court held unconstitutional an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts", because it suggested a mandatory presumption of intent.

We repeat our warning here, although we do not find that the instruction requires a reversal of the convictions. This instruction is saved by the fact that it makes clearer than did the instruction condemned in Sandstrom that the jury is not required to infer intent from the defendant's actions, and because the instructions taken as a whole adequately informed the jury that the government has the burden of proving intent beyond a reasonable doubt.

Breach of Fiduciary Duty

Appellants' remaining challenges are without merit. Appellant Greenleaf urges that the convictions should be reversed because the indictment alleged that the scheme was devised to defraud both the employer and the appellants' union and the jury was permitted to

convict if it found either portion of the scheme to be proven beyond a reasonable doubt. He challenges the portion of the indictment alleging fraud based on breach of a fiduciary duty to Local 25 and its members. Appellant acknowledges that breach of a fiduciary duty may in some cases support a conviction for mail fraud. See United States v. Barta, 635 F.2d 999, 1006 (2d Cir. 1980) ("Sec. 1341 reaches some schemes causing intangible loss"). It is not clear whether he would have us find that Manning (whom appellant is charged with aiding and abetting) was not in a fiduciary relationship with the union or whether mail fraud requires an additional duty, not borne by Manning. In either case, we find his arguments unpersuasive. Ruling on pretrial motions to dismiss, the district court specifically addressed the issue of

whether Manning was in a fiduciary relationship with the union sufficient to support a mail fraud count. The court found that "[a]s the union trustee and organizer, he was responsible for negotiating contracts on the union's behalf. This appears to be a 'position of great trust and power' equivalent to that of Barta." See United States v. Barta, supra. It therefore sustained the mail fraud counts alleging breach of a fiduciary duty against Manning, and against Bratton and Greenleaf as his aiders and abetters. We see no reason to reject this finding.

The second half of appellant's challenge - that mail fraud requires an additional affirmative duty imposed by statute or special circumstance is based on an incorrect reading of the applicable case law. It is well settled that breach

of a fiduciary duty, standing alone, does not constitute mail fraud. United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979). Appellant relies on United States v. Barta, supra, to argue that the additional requirement must be a specific duty, such as the duty found in Barta, to disclose information. The court in Barta, however, did not indicate that mail fraud requires a breach of a specific duty. It merely noted that "[t]he additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer." 635 F.2d at 1006. There are other elements that transform a fiduciary breach into mail fraud. The easiest case is where there is a recognizable scheme formed with specific intent to defraud. United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir.

1980); United States v. Goss, 650 F.2d 1336, 1346 (5th Cir. 1981). There are some close questions in this case, but whether there was enough evidence for the jury to find a recognizable scheme formed with specific intent to defraud is not one of them. There must, of course, be some loss -- though intangible -- to the union, but there was sufficient evidence for the jury to find that the union was deprived at least of the loyal and faithful service and honest representation owed to them by Joseph Manning.

Confrontation Right

Appellant Bratton argues that he was denies his Sixth Amendment right to confront the witnesses against him because he was incriminated by hearsay evidence introduced against Manning and then, when Manning's case was severed for medical

reasons, was unable to cross-examine Manning regarding the hearsay statements. The judge instructed the jury to consider the testimony only against Manning. Appellant relies on Bruton v. United States, 391 U.S. 123 (1968), to argue that "[w]hen powerfully incriminating inadmissible hearsay is introduced into evidence and the defendant is unable to cross-examine the maker of the hearsay statement, the defendant's Sixth Amendment right of confrontation is violated even when the court has instructed the jury to disregard the statement." We agree. In this case, however, we do not find the statement to have been powerfully incriminating.

The hearsay statement challenged by appellant was related by William O'Leary. O'Leary testified that

> [Manning] said, "We're in

> trouble." I said, "What do you mean 'we'? He said, "Someone signed an application, used your signature, social security number and put you on the payroll of the Brinks Job."
>
> [Manning] also said, "I yelled at this person for doing this."

Appellant recognizes that the statement, standing alone, is not powerfully incriminating. He argues, however, that the statement must be taken in conjunction with the testimony of another witness who testified that the person who worked as Manning's subordinate on The Brink's Job was Bratton. Even without the hearsay statement, howver, there was substantial evidence that Bratton had forged O'Leary's name on the application. Counsel for Bratton admitted as much in his closing argument, when he urged that Bratton had an innocent purpose in writing O'Leary's name. This case is thus virtually indistinguishable from United States v. DiGregorio, 605 F.2d 1184,

1190 (1st. Cir. 1979), where we held that because "[t]here was substantial evidence independent of the extrajudicial statement to link [the defendant] to the conspiracy. . . [t]he fact that a codefendant's admission tended to corroborate the government's case against [the defendant] is simply not enough" to satisfy the "powerfully incriminating" standard of Bruton.

## Consecutive Sentences for RICO and Mail Fraud

Finally, both appellants argue that the court's imposition of consecutive sentences for the RICO convictions and for the predicate offenses of mail fraud violates the Double Jeopardy Clause. We are persuaded that RICO and mail fraud constitute separate offenses, see United States v. Boylan, 620 F.2d 359,

361 (2d Cir. 1980), and that Congress intended to impose separate sentences for each offense. United States v. Rone, 598 F.2d 564, 571-72 (9th Cir. 1979).

The judgment of the district court is affirmed.

**18 USC§ 2. Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

**18 USC§ 1341. Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**18 USC § 1961. Definitions**

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS

§ 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

**18 USC § 1962. Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

**18 USC § 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

## Rule 29. Motion for Judgment of Acquittal

**(a) Motion before submission to jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

**(b) Reservation of decision on motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

**(c) Motion after discharge of jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.